85-540

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GERALD NEIL CALLAHAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Are the words of a profane epithet[1] hollered into the face of a peace officer who had repeatedly warned the speaker to stop interfering with a crime scene investigation "fighting words" or free speech protected by the First and Fourteenth Amendments to the United States Constitution?

2. Does a conviction for using "fighting words" require proof that the person to whom the words were spoken reacted with immediate violence when that person is a peace officer inured to vulgar language?

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[1] The epithet was "You fucking asshole!"

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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GERALD NEIL CALLAHAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, entered on May 22, 1985, and modified on June 3, 1985, which reversed the judgment of conviction. The opinion was certified for publication. On June 3, 1985, the court modified the language in the opinion. On August 1, 1985, the Supreme Court of the State of California denied a petition for review, but ordered the opinion to be depublished. The remittitur was issued on August 27, 1985. On August 30, 1985, the California Supreme Court issued a new order publishing the opinion.

OPINIONS BELOW

A copy of the opinion and modification issued by the California Court of Appeal, Fourth Appellate District, appears as Appendix A of this petition. A copy of the California Supreme Court's order denying review appears as Appendix B. A copy of the opinion of the Appellate Division of the Superior Court of the State of California, originally certified for publication, appears as Appendix C.

JURISDICTION

The order of the California Supreme Court denying review was filed on August 1, 1985. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments One and Fourteen; California Penal Code section 415(3).

STATEMENT OF THE CASE

On August 27, 1983, the respondent was arrested for violation of California Penal Code section 148, interfering with a police officer in lawful performance of his duties. On December 22, 1983, a verified complaint was filed in the Municipal Court of the State of California charging respondent with violating Penal Code section 148. The respondent was duly arraigned and entered a plea of not guilty.

On March 21, 1984, jury trial began in the Municipal Court of the State of California, County of San Diego, North County Judicial District. Following the presentation of all evidence, respondent requested the jurors be instructed they could find respondent guilty of violating Penal Code section 415(3), use of words in a public place inherently likely to provoke an immediate violent reaction, as a lesser related offense if they did not find respondent guilty of violating Penal Code section 148. His request was granted.

On March 26, 1984, the jury returned verdicts finding respondent not guilty of violating Penal Code section 148 but guilty of violating Penal Code section 415(3). On May 25, 1984, respondent was placed on probation.

On June 25, 1984, respondent filed a notice of appeal. On August 9, 1984, petitioner filed its proposed settled statement of facts on appeal. On August 21, 1984, the court certified petitioner's proposed statement as the settled statement of facts on appeal.

On February 22, 1985, the Appellate Department of the Superior Court of San Diego County, California, unanimously affirmed respondent's conviction.

On March 7, 1985, the Appellate Department of the Superior Court requested its opinion be published pursuant to rule 976(b) of the California Rules of Court.

On March 18, 1985, the matter was ordered transferred to Division One of the Court of Appeal, Fourth Appellate District, pursuant to rule 62(a), California Rules of Court.

On May 22, 1985, the Court of Appeal reversed the conviction in a published opinion.

On June 3, 1985, the Court of Appeal modified language in its opinion.

On August 1, 1985, the California Supreme Court denied petitioner's petition for review and ordered the opinion depublished.

On August 30, 1985, the California Supreme Court ordered that the opinion be published.

STATEMENT OF FACTS[2]

At 12:19 a.m. on August 27, 1983, early Saturday morning, California Highway Patrol Officer C. F. George was dispatched to 607 South Cedros, Solana Beach, to investigate a traffic collision. He arrived at 12:31 a.m. He initially determined that a truck had struck two parked cars. Witnesses directed him to the driver of the truck, who was seated on a lawn chair, being attended to by several persons, including the respondent's wife.

Officer George saw that the driver had sustained a superficial scratch on his forehead and asked if he wanted to go to a hospital. The driver adamantly stated he did not.

Officer George returned to the scene of the collision to begin his investigation. He was anxious to clear the area inasmuch as the vehicles involved were in the street and would present a traffic hazard to persons who would soon begin leaving bars in the area.

When Officer George returned to the driver of the truck to take his statement, the respondent announced that he was a doctor, had examined the driver and felt he required medical attention. The respondent appeared to be intoxicated.

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[2] The facts are taken from the settled statement of facts on appeal engrossed and certified by the Honorable Zalman J. Scherer, Judge of the Municipal Court. A copy of the statement appears as Appendix D of this petition. The settled statement is the only record of facts in this cause.

Officer George advised the respondent that the driver had declined medical attention. The respondent began arguing with the officer. Officer George turned to the driver and asked again if he desired medical attention. The respondent's wife and another person replied, "Yes!" and the driver subsequently agreed. Officer George then radioed for an ambulance and returned to the collision scene.

While Officer George gathered witness statements, the respondent interrupted and asked about the ambulance. Officer George told him that one was on the way. The respondent responded, "Oh bull-shit! Don't give me that fucking shit." Officer George warned the respondent not to interfere and turned away to complete his investigation.

The respondent continued to follow the officer around yelling and using profanities. He interrupted the officer several times as he spoke to witnesses. He stepped in front of Officer George several times yelling for the ambulance as the officer attempted to move away from him. On at least two occasions he was so close to Officer George that he spat in his face as he argued for medical attention.

Officer George warned the respondent three times to stop interfering or he would be arrested for delaying a police officer in violation of Penal Code section 148. After the third warning, the respondent called the officer a "fucking asshole" and was arrested.

The driver of the truck, treated and released at the scene by paramedics, was also arrested for violation of Vehicle Code section 23152(a), driving under the influence of alcohol.

On the way to the detention facility, the respondent apologized to the officer and admitted he had been wrong about the need for medical attention.

The confrontation between the respondent and Officer George lasted between 10 and 20 minutes. There was no direct physical contact between the two during the exchange. Officer George testified the language used by the respondent did not provoke a violent reaction.

Nothing in the settled statement of facts declares that respondent is a *medical* doctor. Nothing in the settled statement of facts declares that Officer George was not "offended" by respondent's vulgar epithets. While Officer George did not react with physical violence, he immediately arrested the respondent.

HOW THE FEDERAL QUESTION IS PRESENTED

Respondent was convicted by jury of using "offensive words in a public place which [were] inherently likely to provoke an immediate violent reaction." (Cal. Pen. Code, § 415(3).) The California Court of Appeal, relying upon *Cohen v. California* (1971) 403 U.S. 15, ruled that respondent's language was free speech protected by the First and Fourteenth Amendments to the United States Constitution. Petitioner did and does argue that the context in which the words were spoken proved the words to be "fighting words" beyond the protection of the First and Fourteenth Amendments. (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568.)

REASONS FOR GRANTING THE WRIT

The context in which angry or hostile words are spoken to a peace officer investigating a crime scene is most important to determining whether the words are protected "free speech" or proscribed "fighting words." The Court of Appeal of the State of California, Fourth Appellate District, erroneously ignored decisions of the United States Supreme Court which require consideration of the context in which the words were uttered. The definitive

line between what words must be endured by peace officers investigating a crime scene and what words are beyond the limits of free expression is precisely and forcefully presented in this case. Peace officers throughout the United States face similar circumstances every day, and citizens need to know the limits, if any, of their right to freely criticize police officers conducting a crime scene investigation. Resolving this question of limits will preserve with clarity our right to free debate and exchange of ideas on the one hand, and our hope for an orderly society reasonably protected by peace officers on the other hand. This is the compelling justification for granting the writ in this case.

ARGUMENT

I

THE CALIFORNIA COURT OF APPEAL IGNORED PRECEDENT OF THIS COURT IN HOLDING THAT THE PROFANE EPITHET SPOKEN TO A POLICE OFFICER CONDUCTING A CRIME SCENE INVESTIGATION WAS FREE SPEECH PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Petitioner knows and cherishes the principle of "free speech." Free debate and exchange of ideas keeps our government responsive to the will of the people, effects necessary change, and distinguishes our country from all others. This greatest of freedoms is therefore written into the First Amendment to the United States Constitution and carefully protected by many important judicial decisions. Whether problems of expression arise in the context of religion (*Cantwell v. Connecticut* (1940) 310 U.S. 296; *Chaplinsky v. New Hampshire, supra*, 315 U.S. 568), civil rights (*Edwards v. South Carolina* (1963) 372 U.S. 229; *Cox v. Louisiana* (1964) 379 U.S. 536), political disillusionment with

the government's treatment of Blacks (*Street v. New York* (1969) 394 U.S. 576), government involvement in Vietnam (*Cohen v. California, supra*, 403 U.S. 15; *Hess v. Indiana* (1973) 414 U.S. 105), or potential interference with law enforcement (*Lewis v. City of New Orleans* (1974) 415 U.S. 130), the United States Supreme Court has consistently, firmly and eloquently refused to tolerate any abridgement of free speech.

Similarly, a free society must be flexible enough to tolerate certain grammatically unpalatable language because "one man's vulgarity is another's lyric." (*Cohen v. California, supra*, 403 U.S. at p. 25.) As stated by Mr. Justice Frankfurter, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures -- and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." (*Baumgartner v. United States* (1944) 322 U.S. 665, 673-674.)

However, courts have also recognized that words are not crystals -- transparent and unchanged. They are the particles of expression and vary greatly in color and content depending upon the circumstances and context. Accordingly, speech protected under the First Amendment is not without limitation.

One limitation is the "fighting words" exception best described in *Chaplinsky v. New Hampshire, supra*, 315 U.S. at pp. 571-572:

> "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and insulting or 'fighting' words -- those which by their very utterance inflict injury or *tend* to incite an immediate breach of the peace. It has been well

> observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [Footnotes omitted; emphasis added.] (315 U.S. at pp. 571-572.)

The respondent's conviction was based upon his use of offensive words in a public place which were inherently likely to provoke an immediate violent reaction, or the use of "fighting words."

Cohen v. California, supra, 403 U.S. 15 and *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721 support respondent's conviction by illustrating the importance of the *context* in which words are spoken. In *Cohen*, the defendant walked down a corridor wearing a jacket bearing the words "Fuck the Draft." There was no personal insult directed to anyone. The principle is clear: *Cohen* held *mere* public display of a single four-letter expletive is not a crime.

Similarly, in *Jefferson v. Superior Court, supra*, 51 Cal.App.3d 721, the defendant walked down a hall with a companion referring to "some person" as a "mother fucker" several times. The profanity was directed to no one. The arresting police officer merely overheard it.

Other important cases define protected language which did not amount to fighting words. In *Street v. New York, supra*, 394 U.S. 576, the defendant stood on a street corner and set fire to an American flag saying, "[w]e don't need no damn flag." In *Norwell v. Cincinnati* (1973) 414 U.S. 14, the defendant used loud, negative words, *but no abusive language*, to protest his arrest. In *Hess v. Indiana, supra*, 414 U.S. 105, the defendant stood in a crowd during an anti-war demonstration and said, "We'll take the fucking street later [or again]." The statement was not directed to anyone and Hess's back was turned to a deputy sheriff who later

testified that he did not think Hess's remark was directed personally to him.

The United States Supreme Court has clearly held mere use of offensive language, without additional circumstances, is insufficient to support a conviction pursuant to California Penal Code section 415(3) for using "fighting words." Petitioner completely agrees with those holdings. Hence, the context in which respondent called Officer George a "fucking asshole" must be considered.

Context is best illuminated by the landmark decision in *Chaplinsky v. New Hampshire, supra*, 315 U.S. 568. In *Chaplinsky*, the United States Supreme Court affirmed the defendant's conviction for using "fighting words" when he called a peace officer a "God damned racketeer" and a "damned Fascist." The Court held such personal, face-to-face abusive language was plainly likely to cause a breach of the peace. As such, those fighting words were not immunized by the Constitutional right to free speech.

Respondent's case involves "fighting words" spoken in an aggravated context. When respondent called Officer George a "fucking asshole" it was not a mere indiscriminate or careless use of profane language, and it *was* directed to someone in particular. The words were spoken to a specific victim in circumstances leaving only one inference -- the words were spoken to provoke a reaction. The words were hostile. The reaction was likely to be hostile -- a "fighting" reaction.

This is *not* a case involving a "good Samaritan" who rushed to aid an injured man and found himself arrested for merely expressing frustration at an officer who did not respond to respondent's request. The officer had responded to respondent's initial request and an ambulance was en route. Respondent's unlawful behavior occurred long after his initial request and after the victim peace officer had thrice requested that respondent not interfere with the

crime scene investigation and witness interviews. The officer's patience and restraint are proved by all the circumstances.

Officer George was responsible for investigating a traffic collision involving three automobiles and a drinking driver. He was also responsible for clearing the vehicles from the street. These facts were obvious to all concerned. The respondent, obviously intoxicated and claiming to be a doctor, was yelling for medical attention that was on its way. When respondent committed this crime he had already been told by Officer George that an ambulance was en route.

This *is* a case where the officer's attempts to note the location of the vehicles, obtain measurements, gather relevant facts, interview witnesses and victims, examine the intoxication level of the driver who caused the collision, and clear the street to avoid further hazards were continuously interrupted by the respondent's tirade and profanities. Officer George was forced to interrupt many phases of his investigation to escape the respondent who followed him around and kept stepping in front of him. Repeated warnings from Officer George were met with numerous profanities yelled by the respondent. Later, when the respondent moved to within inches of the officer and called him a "fucking asshole," respondent was arrested. Taken in context, respondent's words were "fighting words" within the meaning of Penal Code section 415(3) and all authority cited herein.

The decision of the California Court of Appeal is clearly wrong. The judgment should be reversed. The conviction should be reinstated to make it clear to all citizens, including peace officers, throughout the United States that the right to free expression does not include the right to use fighting words against police officers conducting crime scene investigations.

II

THE "FIGHTING WORDS" EXCEPTION TO THE FIRST AMENDMENT'S FREE SPEECH GUARANTEE DOES NOT REQUIRE PROOF THAT THE VICTIM WAS ACTUALLY PROVOKED TO VIOLENCE

California Penal Code section 415(3) proscribes conduct by any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

The California Court of Appeal declared that Officer George was "neither offended by Callahan's foul language nor provoked to react violently." (Appendix A, p. 5.) That assertion is wrong. Officer George was offended enough to immediately arrest the respondent. Although the arrest was for interfering with a police officer in the performance of his duties in violation of Penal Code section 148, the officer was undeniably offended. Officer George's statement that "he was not provoked to violence" by respondent's words does not imply that he was not offended.

It is not required that the auditor who hears "fighting words" be provoked to violence. Penal Code section 415(3) prohibits the *use* of offensive words inherently *likely* to provoke an immediate violent reaction. Our law has always provided that words, no matter how offensive, can never justify violence. It is the provocation of fighting words -- not their results -- which is proscribed by Penal Code section 415(3).

To require such a reaction would practically *encourage* violence by making proof of a violent reaction an element of the crime. This issue was addressed in *Chaplinsky v. New Hampshire, supra*, 315 U.S. at p. 572. In *Chaplinsky*, a peace officer was the victim of conduct quite similar to respondent's conduct. The Supreme Court explained why the violation of law does not depend upon the particular victim's sensitivity. "The test is what men of

common intelligence would understand would be words likely to cause an *average addressee* to fight." [Emphasis added.] The test is *objective*. It focuses upon the words and conduct of the defendant -- not upon the victim's sensitivity.

No other test exists and no other test could be reasonable given the nature of the offense. The fact a particular peace officer is able to restrain himself does not negate the character of the epithet as "fighting words." Had respondent been convicted of directing less vulgar insults toward a more sensitive victim, he would be clamoring to have the objective test applied. The test applies in *any* case -- even when the particular victim is not actually provoked to physical violence.

It has been suggested a higher threshold of "offensiveness" should be demonstrated where the language is directed to a police officer rather than an ordinary citizen. The rationale is that officers should be inured to abusive language. The reasoning is faulty and it is greatly outweighed by public policy considerations.

To apply the "fighting words" exception differently toward police officers makes little sense. Police officers are bound by its prohibition. They should be accorded its protection *and* citizens near an investigation scene should not be subjected to offensive language not otherwise allowed by law. It is hard enough to interview witnesses at a crime scene. To subject officers and witnesses to barrages of vulgar epithets hurled only at the officer is to make crime scene investigation nearly impossible.

More importantly, a society that expects law and order deserves the opposite of what the California Court of Appeal has held. That an otherwise reasonably decent segment of our citizenry seems to see red when a policeman appears is an anomaly of our times. To those who say he is not much, society responds, he is all we have. Discredit him and we deny ourselves protection from the criminal.

It is true that police officers should be inured to working under difficult and often exasperating conditions. They should be able to do so in the somewhat contradictory manner of brandishing a Smith & Wesson in one hand, an olive branch in the other, one eye on the miscreant and the other on the Constitution. They should be accustomed to scorn, abuse and denigration that perhaps should be reserved for the criminal element. Yet, it should not be *presumed*.

The officer's ability to maintain law and order depends upon his status. As a symbol of law enforcement, he must be respected. Maintenance of law and order is a fundamental concern. One of the most vital parts of our criminal justice system is the police officer -- often the only contact citizens have with that system. To emasculate that respect by effectively immunizing high-velocity verbal attacks against police officers at any time by any person would thwart the reasonable expectations of our society.

In summary, it makes no sense to ascribe to a police officer a tolerance or boiling point higher than the ordinary man; such reasoning violates the principles recited in *Chaplinsky v. New Hampshire, supra*, 315 U.S. 568. To foster impunity toward the law puts society in danger without benefiting anyone.

Officer George's self-restraint, corroborated by civilian witnesses, was admirable. To penalize his self-restraint by excluding him from the class of victims protected by section 415(3) because he was self-restrained is absurd and patently unfair. Neither a police officer nor any other citizen is required to suffer from a face-to-face abusive verbal attack which is but a step away from violence no matter how self-disciplined the victim happens to be. Legislatures have enacted laws proscribing fighting words to serve the legitimate social purpose of protecting *all* individuals from being provoked to violence by the use of "fighting words." Their wisdom should be respected, not ignored.

The California Court of Appeal ignored the circumstances and immunized respondent's epithet by calling it "free speech." In so doing the court condemned peace officers everywhere to work without hope and without knowing the limits of what they must endure from a hostile citizen. All citizens and peace officers need to know what is and what is not free speech under these circumstances. Our society cannot be peaceful and orderly without such knowledge.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the California Court of Appeal.

Dated: September 26, 1985

Respectfully submitted,

By:_____
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APPENDICES

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Kenneth G. Gibson, Clerk
MAY 22 1985
COURT OF APPEAL, FOURTH DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD NEIL CALLAHAN,

Defendant and Appellant.

D002890

(Super. Ct. Nos. CR 70005
B 92179)

APPEAL from a judgment of the Municipal Court of San Diego County, Zalman J. Scherer, Judge. On transfer from the Superior Court, Appellate Department. Reversed.

James M. Gattey and Stephen W. Parrish for Defendant and Appellant.

Edwin L. Miller, Jr., District Attorney, Brian E. Michaels and Gloria L. Michaels, Deputy District Attorneys, for Plaintiff and Respondent.

A California highway patrolman arrested Gerald Callahan for interfering with the performance of his duty (Pen. Code, § 148), the sole charged offense. A jury found Callahan not guilty of violating section 148, but guilty of uttering offensive words in public which were inherently likely to provoke an immediate

violent reaction (Pen. Code, § 415, subd. (3)), a lesser related offense (see *People v. Geiger*, 35 Cal.3d 510, 521, 525, 526, 527, 531-532). Callahan's appeal to the Appellate Department of the Superior Court went for naught. We ordered transfer to this Court (Cal. Rules of Court, rule 62(a)).

The record leaves much to be desired. A party in a criminal case is entitled to a sufficient record to provide him a meaningful appeal. (See *March v. Municipal Court*, 7 Cal.3d 422, 428.) We do not have a reporter's or verbatim transcript of the trial. Each party tendered a proposed settled statement of facts. Our Supreme Court says, "Sometimes a settled statement agreed to by both sides will be sufficient, . . ." (*March v. Municipal Court, supra*, 7 Cal.3d 422, 428.) Here the trial court accepted the factual statement tendered by the People and rejected Callahan's tender.[1] Incomplete though it may be, we look only to the accepted statement of facts. As a matter of law the facts do not support the conviction.[2] We reverse.

I

Soon after midnight Highway Patrolman George received a message to investigate a traffic collision in Solana Beach. He found a truck had struck two parked cars. The truck driver was seated in a lawn chair being attended by several persons, including Callahan's wife. George thought the driver had a superficial scratch on his forehead. The driver stubbornly refused going to the hospital. George returned to the collision site, anxious to clear the area to eliminate a traffic hazard for persons about to be leaving nearby bars.

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[1] Callahan's proposed settled statement gives a more extensive uncontested background of the event, pointing out, e.g., it occurred in the street in front of his home. He himself was not a motorist at that time. Without this information, one might have the impression Callahan was a traveler on the highway.

[2] Had Callahan been convicted of interfering (Pen. Code, § 148), we would affirm.

When George returned to the truck driver for his statement, Callahan announced he was a doctor, he had examined the driver and thought he required medical attention. Callahan appeared to be intoxicated. George told Callahan the driver had declined medical attention. When Callahan argued with George, the officer again asked the driver if he wanted medical attention. After Callahan's wife and another person said "Yes," the driver agreed. George radioed for an ambulance and returned to the collision scene.

While George gathered statements from witnesses, Callahan interrupted and inquired about the ambulance. George said one was on the way. Callahan responded, "Oh bull-shit! Don't give me that fucking shit." George warned Callahan not to interfere and turned away to complete his investigation. Callahan followed him, yelling and uttering profanities, interrupting him as he spoke to witnesses, stepping in front of him several times yelling for the ambulance. At least twice he was so close to the officer that he spat[3] in his face as he argued for medical attention.

Three times George warned Callahan to stop interfering or he would arrest him for delaying a police officer in violation of Penal Code section 148. After the third warning, when Callahan called the officer a "fucking asshole,"[4] the officer arrested him.

The entire confrontation lasted between 10 and 20 minutes. There was no direct physical contact between Callahan and George. The officer testified Callahan's language did not provoke a violent reaction.

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[3] In their briefs, both sides say "spittle struck the officer's face."

[4] To avoid continuous repetition of the phrase which arguably would assist its passage into parlor parlance, we refer to it as the "Callahan epithet."

II

This nation prides itself as unsurpassed in upholding the freedom of its people to express themselves as they see fit without fear, subject only to certain reasonable conditions prescribed by law.

A land as diverse as ours must expect and tolerate an infinite variety of expression. What is vulgar to one may be lyric to another (*Cohen v. California* (1971) 403 U.S. 15, 25). Some people spew four-letter words as their common speech such as to devalue its currency; their repetition dulls the senses; Billingsgate thus becomes commonplace. Not everyone can be a Daniel Webster, a William Jennings Bryan or a Joseph A. Ball.

Some writers exalt sex and earthy words to sell their books. Not everyone is a Louis L'Amour, whose hero swears if at all under his breath and whose heroine's suggestiveness, at most, is to walk away, her shoulders prim, her hips less so.

In 1972 this court considered *In re Rowena V.* (4 Crim. 4237).[5] Rowena, traveling south on Interstate 5, shouted, "You ask me if I give a fuck" to some boys in the next lane. Mrs. Reitsma, a stranger, overheard the phrase and became upset. Reitsma followed Rowena, caused a security officer to stop her, and in the officer's presence, Reitsman, wrought with righteous rectitude, wrathfully requested Rowena to repeat the rude and revolting remark. Rowena readily responded with a reprise. Reitsma filed a citizen's complaint against Rowena. Rowena was convicted of disturbing the peace (Pen. Code, § 415),[6] and was imprisoned. We

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[5] An unpublished opinion to which we may refer (*People v. Castro*, 38 Cal.3d 301, 323).

[6] Penal Code section 415, differently worded in 1972 compared to the section today, provided in relevant part:

"Every person who maliciously and wilfully disturbs the peace . . . by tumultuous or offensive conduct or [uses] any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud or boisterous manner, is guilty of a misdemeanor . . . ."

granted habeas corpus, pointing out the dual communicative function of words, emotive as well as cognitive (*Cohen v. California, supra*, 403 U.S. 15, 26). We construed Rowena's remark as being in effect, "You ask me if I give a damn."

Fifty years ago the words "damn" and "hell" were as shocking to the sensibilities of some people as the Callahan epithet is to others today.[7] The first word in Callahan's epithet has many meanings. When speaking about coitus, not everyone can be a Frederick E. Smith (later Earl of Birkenhead) who, in his speech in 1920 in the House of Commons on the Matrimonial Causes Act, referred to "that bond by which nature in its ingenious telepathy has contrived to secure and render agreeable the perpetuation of the species."

A farmer when asked why he struck his mule on the head with a two by four responded, "I am trying to get his attention." Here Dr. Callahan was trying to get the officer's attention to a situation he perceived as requiring medical attention. Under the circumstances here, Callahan's epithet was not inherently likely to provoke an immediate violent reaction. The record shows the officer was neither offended by Callahan's foul language nor provoked to react violently (*Cohen v. California, supra*, 403 U.S. 15, 20). His only concern was not to be interrupted in performing his duty. The incident lasted 10 to 20 minutes, during which Callahan uttered many profanities, dulling the senses as he argued for medical attention. Officer George warned Callahan several times to stop interfering with him and finally told Callahan if he interfered once more he would arrest him for delaying an officer in violation of Penal Code section 148. After that, anything done by Callahan which George considered as interfering would be cause for arrest.

---

[7] Who in that earlier generation can forget the shock wave generated by Clark Gable when as Rhett Butler he said to Scarlett, "Frankly, my dear, I don't give a damn." (Sidney Howard, screenplay for *Gone With the Wind* (1939).) Also, "My dear, I don't give a damn." (Rhett Butler to Scarlett O'Hara in *Gone With the Wind*, Margaret Mitchell (1936).) (Familiar Quotations, John Bartlett (15th ed. 1980) p. 848.)

When Callahan then uttered his epithet, George, true to his word, arrested him solely for interfering, for which the jury found Callahan not guilty. The mere fact Callahan used opprobrious words did not create a Penal Code section 415, subdivision (3) situation.

Judgment reversed.

CERTIFIED FOR PUBLICATION.

Brown
BROWN, P.J.

WE CONCUR:

Stanforth
STANIFORTH, J.

Butler
BUTLER, J.

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

FILE
Kenan G. Casady, Clerk
JUN - 3 1985
COURT OF APPEAL/FOURTH DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

vs.

GERALD NEIL CALLAHAN,

Defendant and Appellant.

No. D002890

SUPERIOR COURT NO.
CR 70005
B 92179

THE COURT:

MODIFICATION OF OPINION

The above opinion filed May 22, 1985, is modified as follows:

Page 7, starting at line 16 the opinion should read: "him and finally said if Callahan interfered once more he would arrest him for delaying an officer in violation of Penal Code section 148. After that, anything Callahan did which George thought interfered would result in arrest. When Callahan uttered his epithet, George, true to his word, arrested him solely for interfering, for which the jury found Callahan not guilty. The fact Callahan . . ."

Brown
Presiding Justice

Copies to: All parties.

B-1

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D002890

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

GERALD NEIL CALLAHAN

SUPREME COURT
FILED
AUG 1 1985
LAURENCE P. GILL, Clerk
Deputy

Appellant's petition for review DENIED.

Mosk, J. and Reynoso, J., are of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed May 22, 1985, which appears at 168 Cal.App.3d 631. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

Bird, C.J., is of the view the opinion should remain published.

BIRD

Chief Justice

C-1

FILED
Robert D. Zumwalt, Clerk
MAR -7 1985
ROSE MARIE LEE

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GERALD NEIL CALLAHAN, Defendant and Appellant.	SUPERIOR COURT NO. CR 70005 MUNICIPAL COURT NO. B 92179 (North County Judicial District) **ORDER**

THE COURT:

The opinion filed February 22, 1985 is hereby ordered CERTIFIED FOR PUBLICATION.

Counsel for the parties are:

Gloria L. Michaels, Esq. for the Plaintiff and Respondent;

James M. Gattey, Esq. for the Defendant and Appellant.

WOODWORTH P.J.

COPIES TO ALL PARTIES

C-2

FILED
Robert D. Zimmer, Clerk
MAR -7 1985
ROSE MARIE LEY

MEMORANDUM

March 7, 1985

TO: The Appellate Section
San Diego Superior Court

FROM: Appellate Judges
San Diego Superior Court

RE: People v. Callahan
Superior Court No. CR 70005
Municipal Court No. B 92179

It is our unanimous decision that this opinion involves a legal issue of continuing public interest in the development of and judicial history of a statute. It is, therefore, our request that pursuant to Rule 976(b) of the California Rules of Court, the attached opinion be submitted to the Chief Justice of the Supreme Court of the State of California for publication.

P.J.
WOOLWORTH

J.
MILKES

J.
McCONNELL

DRW/sv

Attachment

FILED
Robert D. Zumwalt, Clerk
FEB 22 1985
ROSE MARIE LEY

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,	SUPERIOR COURT NO. CR 70005
Plaintiff and Respondent,	MUNICIPAL COURT NO. B 92179 (North County Judicial District)
v.	
GERALD NEIL CALLAHAN,	**OPINION**
Defendant and Appellant.	

The appellant, a doctor, was a bystander at a traffic accident scene on August 27, 1983. He took exception to the Highway Patrol officer's arrangements for an injured accident victim. He followed the investigating officer around, became progressively vocal and obstreperous, and finally looked directly at the officer's face and called him a "fucking asshole". He was immediately arrested.

The defendant was charged with violation of Penal Code section 148 (Delaying or Obstructing a Peace Officer), but the jury was instructed at defendant's request on the "lesser related offense" of violating Penal Code section 415(3). This section prescribes punishment for "Any person who uses offensive words in a public

place which are inherently likely to provoke an immediate reaction."

After long deliberation the jury acquitted appellant of the principal charge of violating section 148--as to which the evidence was undoubtedly sufficient to support a conviction but convicted him of violating section 415(3). Appellant contends that the words used were protected, under the circumstances, by the First Amendment. He argues that since the officer testified he did not react violently in fact, and since the appellant was merely communicating an idea, there was no violation of this section.

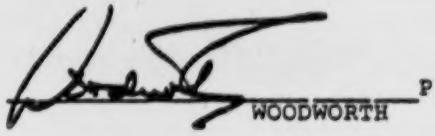
We disagree. On the facts of this case, the appellant's obscene outburst was inherently *likely* to provoke violence. An investigating officer at an emotion-charged scene must not be exposed to such provocation. We believe that such words are likely on their face to provoke a violent reaction either on the part of bystanders or from the officer himself. The fact that this particular officer was able to restrain himself from a violent reaction does not negate the character of the epithet as "fighting words".

We do not mean to imply, of course, that everyone who directs an obscenity at a police officer should be jailed. In general, police officers are held to a higher threshold of tolerance than is expected of ordinary citizens.

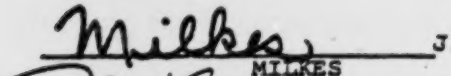
Two leading decisions relied on by appellant, however, are clearly distinguishable from the case at hand. In both *Cohen v. California* (1971) 403 U.S. 15, rehearing denied 404 U.S. 876 and *Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, the provocative words were not aimed at anyone in particular, but rather constituted expressions, however tasteless, of the defendant's opinion. The police officer in each case was simply an observer, not the butt of the obscenity.

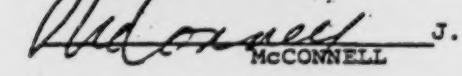
Finally, since the LRO instruction was requested by appellant, it would seem the error, if any, was invited.

The conviction and the judgment of the trial court are therefore affirmed.



WE CONCUR:





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AUG 3 3 26 PM '84
CLERK OF COURT
NCMC

Attorneys for Plaintiff and Respondent

IN THE MUNICIPAL COURT,
NORTH COUNTY JUDICIAL DISTRICT

COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	CASE NO. B92179
Plaintiff and Respondent,	RESPONDENT'S PROPOSED SETTLED STATEMENT OF FACTS ON APPEAL
v.	
GERALD NEIL CALLAHAN,	
Defendant and Appellant.	

Comes now the Plaintiff and Respondent, the People of the State of California, by and through its attorneys, EDWIN L. MILLER, JR., District Attorney, and GLORIA L. MICHAELS, Deputy District Attorney, and submits the following Proposed Settled Statement of Facts on Appeal.

Respondent has no objection to the assertions presented in appellant's Preliminary Statement of the Case except his characterization of the alleged qualification he made to his proposed

instruction on Penal Code section 415(3) (pp. 2-3; lines 25-28, 1-3) and of the prosecution's argument (p. 3, lines 4-7). Appellant made no such qualification to his proposed instruction. The prosecution did not argue that "the evidence was clear that the elements of violation of Penal Code section (3) were not shown by the evidence."

The prosecution did state that the case involved delaying a police officer-and not a mere breach of the peace.

PROPOSED STATEMENT OF FACTS

At 12:19 a.m. on August 27, 1984, early Saturday morning, California Highway Patrol Officer C.F. George was dispatched to 607 South Cedros, Solana Beach, to investigate a traffic collision. He arrived at 12:31 a.m. He initially determined that a truck had struck two parked cars. Witnesses directed him to the driver of the truck, who was seated on a lawn chair, being attended to by several persons, including the appellant's wife.

Officer George saw that the driver had sustained a superficial scratch on his forehead and asked if he wanted to go to a hospital. The driver adamantly stated he did not.

Officer George returned to the scene of the collision to begin his investigation. He was anxious to clear the area inasmuch as the vehicles invlolved [*sic*] were in the street and would present a traffic hazard to persons who would soon begin leaving bars in the area.

When Officer George returned to the driver of the truck to take his statement, the appellant announced that he was a doctor, had examined the driver and felt he required medical attention. The appellant appeared to be intoxicated.

Officer George advised the appellant that the driver had declined medical attention. The appellant began arguing with the

officer. Officer George turned to the driver and asked again if he desired medical attention. The appellant's wife and another person replied, "Yes!" and the driver subsequently agreed. Officer George then radioed for an ambulance and returned to the collision scene.

While Officer George gathered witness statements, the appellant interrupted and asked about the ambulance. Officer George told him that one was on the way. The appellant responded, "Oh bullshit! Don't give me that fucking shit." Officer George warned the appellant not to interfere and turned away to complete his investigation.

The appellant continued to follow the officer around yelling and using profanities. He interrupted the officer several times as he spoke to witnesses. He stepped in front of Officer George several times yelling for the ambulance as the officer attempted to move away from him. On at least two occasions he was so close to Officer George that he spat in his face as he argued for medicial [*sic*] attention.

Officer George warned the appellant three times to stop interfering or he would be arrested for delaying a police officer in violation of Penal Code section 148. After the third warning, the appellant called the officer a "fucking asshole" and was arrested.

The driver of the truck, treated and released at the scene by paramedics, was also arrested, for violation of Vehicle Code secton [*sic*] 23152(a), driving under the influence of alcohol.

On the way to the detention facility, the appellant apologized to the officer and admitted he had been wrong about the need for medical attention.

The confrontation between the appellant and Officer George lasted between ten and twenty minutes. There was no direct physical contact between the two during the exchange. Officer

George testified the language used by the appellant did not provoke a violent reaction.

The appellant was tried for violation of Penal Code section 148. After the evidence had been presented, the appellant requested that the jury be instructed on the lessor [*sic*] related offense of Penal Code section 415(3). That request was granted.

The jury found the appellant not guilty of violation of Penal Code section 148 and guilty of violation of Penal Code section 415(3).

Executed at Vista, California, this August 9, 1984.

Respectfully submitted,

EDWIN L. MILLER, JR.
District Attorney

By: GLORIA L. MICHAELS
Deputy District Attorney

Attorneys for Plaintiff
and Respondent

Engrossed and certified as the settled statement on appeal.

Dated: August 21, 1984

ZALMAN J. SCHEBER, Judge of the
Municipal Court

Supreme Court, U.S.
FILED
DEC 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-549

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
VS.
GERALD NEIL CALLAHAN,
Respondent.

BRIEF IN RESPONSE AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent

*Counsel of Record

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29pp

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No. 85-549

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GERALD NEIL CALLAHAN,

Respondent.

BRIEF IN RESPONSE AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Gerald Neil Callahan, respectfully prays that this Honorable Court exercise its discretion to deny petitioner's request for a writ of certiorari to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate

District, entered on May 22, 1985, and modified on June 3, 1985, which reversed the judgment of the trial court.

OPINIONS BELOW

Respondent is not dissatisfied with the presentation of the opinions and judgments delivered in the courts below set forth in the appendices to the petition for writ of certiorari, and respondent therefore, pursuant to Rule 34.2, does not include the opinions below in this brief.

JURISDICTION AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent is not dissatisfied with the presentation of the jurisdictional grounds and the constitutional and statutory provisions involved which are set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondent is not aware of any inaccuracy in the Statement of the Case set forth in the petition for writ of certiorari.

Respondent submits, however, that this Court should be aware of additional matter regarding the adoption of the settled statement of facts on appeal which is not included in the Statement of the Case submitted by petitioner.

Subsequent to the filing of respondent's notice of appeal on June 25, 1984, the respondent prepared and filed his proposed settled statement on appeal, which was filed with the trial court on July 10, 1984. Petitioner did not file any proposed amendments to respondent's proposed settled statement, and instead, on August 9, 1984, filed its own proposed settled statement of facts on appeal.

On August 21, 1984, the trial court

certified petitioner's proposed statement as the settled statement of facts on appeal, completely disregarding the proposed statement submitted by respondent, and, respondent respectfully submits, contrary to the provisions of Rule 127 of the California Rules of Court.

The proposed settled statement which was submitted by respondent and disregarded by the trial court included a more detailed statement of the facts which, as suggested by the California Court of Appeal in its opinion below, would have provided a reviewing court a more complete picture of the facts and evidence.

STATEMENT OF FACTS[1]

At 12:19 a.m. on August 27, 1983, early Saturday morning, California Highway Patrol Officer C.F. George was dispatched to 607 South Cedros, Solana Beach, to investigate a traffic collision. He arrived at 12:31 a.m. He initially determined that a truck had struck two parked cars. Witnesses directed him to the driver of the truck, who was seated on a lawn chair, being attended to by several persons, including the respondent's wife.

Office George saw that the driver

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[1]The facts are taken from the settled statement of facts on appeal engrossed and certified by the trial court pursuant to Rule 127, California Rules of Court. A copy of the settled statement appears as Appendix D to the petition for writ of certiorari. As noted by the California Court of Appeal in its opinion below, the settled statement left "much to be desired" and was incomplete. The Court of Appeals concluded, however, that even on the basis of the accepted statement of facts, limited though it may have been, the facts did not, as a matter of law, support the conviction.

had sustained a superficial scratch on his forehead and asked if he wanted to go to a hospital. The driver adamantly stated he did not.

Officer George returned to the scene of the collision to begin his investigation. He was anxious to clear the area inasmuch as the vehicles involved were in the street and would present a traffic hazard to persons who would soon begin leaving bars in the area.

When Officer George returned to the driver of the truck to take his statement, the respondent announced that he was a doctor, had examined the driver and felt he required medical attention. The respondent appeared to be intoxicated.

Officer George advised the respondent that the driver had declined medical attention. The respondent began

arguing with the officer. Officer George turned to the driver and asked again if he desired medical attention. The respondent's wife and another person replied, "Yes!" and the driver subsequently agreed. Officer George then radioed for an ambulance and returned to the collision scene.

While Officer George gathered witness statements, the respondent interrupted and asked about the ambulance. Officer George told him that one was on the way. The respondent responded, "Oh bull-shit! Don't give me that fucking shit." Officer George warned the respondent not to interfere and turned away to complete his investigation.

The respondent continued to follow the officer around yelling and using profanities. He interrupted the officer several times as he spoke to witnesses.

He stepped in front of Officer George several times yelling for the ambulance as the officer attempted to move away from him. On at least two occasions he was so close to Officer George that he spat in his face as he arqued for medical attention.[2]

Officer George warned the respondent three times to stop interfering or he would be arrested for delaying a police office in violation of Penal Code section 148. After the third warning, the respondent called the officer a "fucking asshole" and was arrested.

---

[2]As noted by the California Court of Appeal in its opinion below, the parties to this appeal have not contended that respondent spat in the face of Officer George. The meaning of the perhaps misleading choice of words in the settled statement of facts on appeal is that spittle from respondent hit the officer in the face as respondent argued with him for medical attention and not as any deliberate show of contempt for the officer.

The driver of the truck, treated and released at the scene by paramedics, was also arrested for violation of Vehicle Code section 23152(a), driving under the influence of alcohol.

On the way to the detention facility, the respondent apologized to the officer and admitted he had been wrong about the need for medical attention.

The confrontation between respondent and Officer George lasted between 10 and 20 minutes. There was no direct physical contact between the two during the exchange. Officer George testified the language used by the respondent did not provoke a violent reaction.

It should be noted that nothing in the settled statement of facts declares that respondent is other than a medical doctor, and further, nothing in the

settled statement of facts declares that Officer George was offended by respondent's remarks, or that he arrested respondent because he was offended or provoked or likely to be provoked to violence. In fact, the record would appear to be clear that the arrest of respondent was for interfering with Officer George in the performance of his duties, not for the use, per se, of offensive language or "fighting words." Finally, there is nothing in the record on which petitioner's assertion that other witnesses overheard the offending language can be based.

REASONS FOR DENYING THE WRIT

Contrary to the petitioner's oft stated assertion that the California Court of Appeal failed to consider the context in which the offending words were spoken, respondent respectfully submits

that the Court of Appeal carefully considered the context in which "the Callahan epithet"[3] was spoken. Although the California Court of Appeals cited in support of its decision the opinion in Cohen v. California (1971) 403 U.S. 15, its decision is not in conflict as petitioner asserts. Further, in the context in which the Callahan epithet was addressed to Officer George, its terms were not "fighting words" which were inherently likely to provoke an immediate violate response on the part of Officer George, or anyone else for that matter, nor were they beyond the protection of the First and Fourteenth Amendments. Chaplinsky v. New Hampshire (1942) 315

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[3] The California Court of Appeal, in its opinion below, preferred to refer to the words at issue as "the Callahan epithet," "[t]o avoid continuing repetition of the phrase which arguably would assist its passage into parlor parlance . . ." The offending words used were "fucking asshole."

U.S. 568.

Respondent would also submit to this Honorable Court that there exists no special or important reason to grant the extraordinary relief prayed for.

ARGUMENT

I

THE CALIFORNIA COURT OF APPEAL CORRECTLY HELD THAT THE EPITHET SPOKEN TO THE POLICE OFFICER CONDUCTING A CRIME SCENE INVESTIGATION WAS NOT, IN THE CONTEXT OF THE FACTS OF THIS CASE, INHERENTLY LIKELY TO PROVOKE AN IMMEDIATE VIOLENT RESPONSE

Petitioner voices a lofty concern for the cherished freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution. In the same breath, however, petitioner would have this Court impose an inflexible limitation on the words which a citizen may use in addressing a police officer, and elevate police officers to a class to be

protected from the commonplace street vernacular of the English language.

Petitioner further asserts that resolving the question of limits with respect to the right to freely criticize police officers will "preserve with clarity our right to free debate and exchange of ideas on the one hand, and our hope for an orderly society reasonably protected by peace officers on the other hand."

The "clarity" which petitioner invites, however, would result in a permanent restriction on the use of certain words of expression and would require this Honorable Court to abandon the reasoned opinion of Mr. Justice Harlan in Cohen v. California.

Cohen v. California (1971) 403 U.S. 15, addressed a predecessor to the present California Penal Code section 415, which prohibited "maliciously and

willfully disturb[ing] the peace or quiet of any neighborhood or person ... by ... offensive conduct." The appellant had worn a jacket with the words "Fuck the Draft" on it in a corridor of the Los Angeles Courthouse. Like the facts of this case, the appellant "did not engage in, nor threaten to engage in, nor did anyone as a result of his conduct in fact commit or threaten to commit any act of violence." 403 U.S. at pp. 16-17.

In Chaplinsky v. New Hampshire (1942) 315 U.S. 568, this Court held that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction. 403 U.S. at p. 20.

Petitioner asserts that the state court is in error in this case since the Callahan epithet was apparently addressed to an individual (Officer George), while in Cohen the offending words were not directed to any one individual. However, the issue presented is not properly subject to such simplistic analysis.

The issue remains, as in Cohen, whether this court should excise, as "'offensive conduct,' one particular scurrilous epithet from the public discourse, ... upon the theory ... that its use is inherently likely to cause violent reaction." 403 U.S. at p. 22. The petitioner's rationale, like that of the California Court in Cohen, is untenable, "reflecting as it does an 'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." 403 U.S. at p. 23.

There is no evidence in the record that a substantial number of citizens "are standing ready to strike out physically at whoever may assault their sensibilities" upon hearing the Callahan epithet.

Nor is there evidence in the record from which it may be assumed that Officer George was offended to the degree that it was inherently likely that he would be provoked to react violently. In fact, Officer George continued to behave in a professional manner without regard to the continued barrage from the respondent. He warned respondent that he would arrest him if he continued to engage in conduct which Officer George deemed to be interference, and, true to his word, when appellant then hurled the final expression, Officer George placed respondent under arrest for interfering with a police officer. Respondent was

acquitted of this charge.[4]

Of singular importance to resolution of this matter is not so much what the settled statement of facts includes, but what it does not include. An analysis of the facts of this case cannot support a conviction which is not in conflict with the Chaplinsky and Cohen cases.

In Chaplinsky v. New Hampshire, supra, this Court cited with approval the language of the highest court of New Hampshire:

> . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are `fighting words'

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[4]The California Court of Appeal, in its opinion below, indicated that if appellant were appealing a conviction of interfering with a police officer (California Penal Code section 148), it would have affirmed.

> when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker -- including `classical fighting words', words in current use less `classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."
> Chaplinsky v. New Hampshire, 315 U.S. at p. 573, citing State v. Brown, 68 N.H. 200, 38 A. 731.

In the cause before this Court, no such situation exists. While it cannot be argued that respondent's epithet was "said with a disarming smile," neither may it be said that respondent's words were anything more than an annoyance to

Officer George. Respondent's conduct, including his unfortunate choice of words used to express his frustration with what he deemed to be the officer's inattention, was viewed by its addressee only as interference, not as a threat to the peace.

The State presumes that the words used by the respondent were fighting words -- those inherently likely to provoke a violent response. As in Cohen, the State's rationale is untenable, reflecting an "undifferentiated fear or apprehension of disturbance." 403 U.S. at p. 23. The record is devoid of any evidence that "substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities" by the utterance of the Callahan epithet. And while it may be true that "[t]here may be some persons about with such lawless and violent

proclivities," that is an insufficient basis for permitting, "consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." 403 U.S. at p. 23.

Respondent was trying to get Officer George's attention. He succeeded in doing so. It took a number of profanities but eventually Officer George thought respondent was interfering with his responsibilities and accordingly arrested him for interfering. There is no evidence in the record that the particular terms used by respondent contributed to the arrest. As the California Court of Appeal indicated, anything respondent said at that time would have led to his arrest.

The appellant's argument really seeks to punish the respondent for

interference, which the jury determined was not proved. Appellant argues, without factual support in the record, that since the words were spoken to provoke a reaction and were hostile, "[t]he reaction was likely to be hostile -- a 'fighting' reaction." All words are spoken to provoke a reaction, but it is impossible to conclude that respondent sought to obtain a hostile reaction on the basis of the record in this case. Respondent was seeking medical attention which he perceived, perhaps incorrectly, the officer had failed to request.

Appellant's argument is pure sophistry. That the court below failed to consider the context in which the words were spoken is simply without merit. A reinstatement of the conviction as prayed by appellant would serve only to excise the words "fucking asshole" from permissible discourse and run "a

substantial risk of suppressing ideas in the process." Cohen v. California, supra, 403 U.S. at p. 26.

II

RESPONDENT HAS NOT CONTENDED, NOR DID THE CALIFORNIA COURT OF APPEAL HOLD, THAT A CONVICTION OF CALIFORNIA PENAL CODE SECTION 415(3) REQUIRES PROOF THAT THE ADDRESSEE WAS ACTUALLY PROVOKE TO VIOLENCE

Appellant next contends that this Court should grant its petition to resolve the issue whether the "fighting words" exception to the First Amendment's free speech guarantee requires proof that the addressee was actually provoked to violence. Appellant has seized on language of the California Court of Appeal in its opinion below that Officer George was "neither offended by Callahan's foul language nor provoked to react violently."

Respondent has never contended, and the California Court of Appeal did not

hold, that proof that Officer George was actually provoked to violence was necessary to support a conviction under the disturbing the peace statute. This is simply not an issue that requires clarification or resolution. All that the California Court of Appeal was correctly pointing out was that there was no showing that anyone who heard the epithet directed to Officer George, including Officer George, was in fact violently aroused or that respondent intended such a result. Cohen v. California, supra, 403 U.S. at p. 20.

Appellant asserts that Officer George was in fact offended. There is nothing in the record to indicate that he was offended, and the court below in fact acknowledged that the record reflected that he was not offended.

However, even if Officer George was offended by the language utilized by

respondent, such is an insufficient reason to punish the respondent for his choice of expression to vent his frustration with the officer's conduct.

Finally, appellant addresses the issue of whether police officer's are to be held to a "higher threshold of 'offensiveness'." Again, respondent has not contended and the California Court of Appeal did not state, that citizens are free to hurl "fighting words" at peace officers because their training and experience somehow inures them to abusive language. That issue was not before the court below.

The issue was whether the words used by respondent were inherently likely, in the context in which spoken, to provoke a violent response. Once it is resolved that they were not, then the issue of whether peace officers are to be held to a higher standard is not

necessary of resolution.

It is respectfully suggested that if this Court is to address such an issue, it should be on the basis of a factual record where the issue was clearly discussed and analyzed by the courts below.

CONCLUSION

It appears that appellant really seeks to reverse the respondent's acquittal by a jury for interfering with a peace officer, and complains of the trial court's instruction regarding disturbing the peace. This complaint should not be elevated to an issue of constitutional proportions requiring this Court to address issues of free speech on the basis of the present record, particularly since the rationale of the California Court of Appeal is in full accord with the decisions of this Court.

For the reasons discussed above, respondent respectfully requests that the petition for writ of certiorari be denied.

DATED: December 20, 1985

Respectfully submitted,

By: _____
JAMES M. GATTEY

By: _____
STEPHEN W. PARRISH

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